SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1902.

Nos. 298 and 297.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

MAY IT PLEASE THE COURT:

A writ of error was sued out of this Court by each of the plaintiffs in error above named, directed to the Supreme Court of the State of Wisconsin, to review the final judgment of that Court affirming the judgment of the Municipal Court of Milwaukee County, Wisconsin, which adjudged the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt guilty of having committed a misdemeanor, as charged in the information, to-wit: conspiracy to injure another in his trade or business under Section 4466a of the

Statutes of Wisconsin of 1898, and sentenced each of them to pay a fine with costs, and in default of payment to be committed to the House of Correction of Milwaukee County at hard labor until such fine and costs were paid, not, however, to exceed thirty days.

STATEMENT.

I. Section 4466a, Statutes of Wisconsin of 1898, provided as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the purpose "of wilfully or maliciously *injuring another in his reputation, "trade, business or profession by any means whatever,* or for the "purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

II. October 1st, 1901, an information (printed record, p. 16) was filed in the Municipal Court of Milwaukee County, Wisconsin, which attempted to set up an offense under the above statute. Reduced to its simplest form, the information, in substance, charged that the accused, viz.: the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt, each of whom was the business manager of a daily newspaper published in the City of Milwaukee, in said county, respectively named the Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, for the purpose and with the intent of wilfully, maliciously and unlawfully injuring the Journal Company (which was a corporation engaged in publishing another daily newspaper in said city, viz.: The Milwaukee Journal) *in its trade and business,* and also Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum (who were stockholders and officers of The Journal

Company), and each of them, in their trade and business; had combined together and agreed that if any person advertising or proposing to advertise in The Milwaukee Journal should pay The Journal Company an increased rate then recently established or fixed by it, then and in that case any such person should not be permitted to advertise in any of the other three newspapers, to-wit: The Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, unless such person should advertise in each of said three papers and should pay to each of them an increase equal to the said recent increase of the Journal's rates over the rates theretofore charged by said three papers respectively; but that in case any person should refuse to pay to The Journal Company its increased rate, then such person should be at liberty to advertise in either or all of the other three papers at the rates which had theretofore been charged by them respectively; and further charged, in substance, that in pursuance of said agreement advertisers had been notified of said agreement and had been induced to withdraw their advertisements from The Milwaukee Journal, and other advertisers had been prevented from advertising therein, all to the injury of The Journal Company.

III. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, each interposed a separate special plea in bar (printed record, p. 19.) These pleas are exactly alike and are in the nature of pleas in confession and avoidance, a precedent for which is found in *Rex vs. Kilderby,* 1 Saunders, 308, cited 1 Chitty Crim. Law, 472.

They admit the agreement and acts in pursuance thereof, as alleged in the information, and while they assert that the intent was to injure The Journal Company, they do not admit that their acts were either malicious or unlawful, but on the contrary they allege "that those acts, intentions, agreements and combinations were done, harbored, made and entered into in *trade competition,* and that such acts, intentions, agreements

and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," and as free men and citizens of the United States and of the State of Wisconsin and as competitors in business with The Journal Company they claimed immunity therefor under Article XIV of the Constitution of the United States, notwithstanding any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary.

IV. The prosecution moved to strike out the special pleas above mentioned, which motions were denied, and thereupon asked that said motions might stand and be considered as demurrers to such special pleas, and the accused consenting thereto it was so ordered. After a hearing the demurrers to said special pleas were sustained, and the accused having elected to stand on their said pleas, were found guilty thereon, as charged in the information, and sentenced as above mentioned.

V. Upon writ of error the Supreme Court of the State of Wisconsin affirmed this judgment (printed record, p. 52), and to review the latter judgment this writ of error was sued out.

VI. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, have each filed assignments of error upon which they rely to reverse said judgment. They are alike, and in substance are as follows (printed record, p. 9.):

(1) The Court erred in sustaining the demurrers interposed by the State of Wisconsin to the pleas filed by the accused, and by holding and deciding that the facts stated in said pleas were not sufficient to constitute a defense to the matters and things charged in the information.

(2) The Court erred in determining that the pleas filed by the accused were not a sufficient justification and defense under

the XIVth amendment of the Constitution of the United States.

(3) The Court erred in sustaining the demurrers of the State of Wisconsin to the pleas of the accused and in not determining upon said pleas that the information was insufficient in law.

(4) The Court erred in adjudging the accused guilty on the record before it, viz.: said information and pleas, and sentencing them to fine and imprisonment and affirming the judgment of the trial court in that regard, for the reason that said record shows that said sentence and conviction were in violation of the rights of said accused under the XIVth amendment of the Constitution of the United States, in that it deprived them of the use of their property without due process of law, and in that it deprived them of the liberty guaranteed them by said XIVth amendment to make contracts not inimical to public health, welfare or morals, and in that it deprived the said accused of their liberty and abridged the privileges and immunities of said accused as citizens of the United States, and denied to them the equal protection of the law.

VII. Melvin A. Hoyt, above mentioned, demurred to the information; his demurrer was overruled, and standing on his demurrer he was found guilty, as charged in the information, and he was sentenced in the same manner. Upon writ of error the Supreme Court of Wisconsin affirmed this judgment, and to review this latter judgment he has sued out his writ of error.

ARGUMENT.

The precise question presented is this: Does Section 4466a, Wisconsin statutes of 1898, as interpreted and applied by the Wisconsin Supreme Court, deprive the accused of their liberty or property in violation of Section 1 of the fourteenth amendment of the Constitution of the United States?

It is settled that the constitutionality of a criminal statute

is to be tested not only by what has been declared criminal under it, but by what may be so declared; for a criminal statute cannot be used as a drag net to ensnare the guilty and innocent, leaving the latter to extricate themselves as they can.

Trade Mark Cases, 100 U. S., 82.

Montana Co. vs. St. Louis Co., 152 U. S., 170 op., citing *Stuart vs. Palmer,* 74 N. Y., 183.

In re Ah Jow, 29 Fed. Rep., 181.

If the Supreme Court of Wisconsin had limited the word "injuring" in this penal statute to mean the infraction of some legal right (11 *Am.* & *Eng. Encyc. of Law,* 1st ed., bot. p. 1, and cases), or had excepted acts of co-operation in trade competition from the purview of the statute in the decision now before this Court on writ of error, different questions might arise. But that Court did not do so. The question of the constitutionality of Section 4466a hereinbefore quoted must be determined in this Court upon the construction given to that statute by the Supreme Court of Wisconsin (*Machine Co. vs. Gage,* 100 U. S., 676), namely: that the statute is meant to prohibit intentional joint action of any kind, which joint action is intended to cause a loss of trade to another. This includes within the purview of the statute co-operation in trade competition. Thus construed we submit the statute is unconstitutional.

It is not difficult to instance cases of purely innocent acts which under this statute, as interpreted and applied, would be deemed criminal. A partnership agreement for the purpose of engaging in a trade which would invade the business field of another and injure him in his business by reducing the number of his customers would be an instance. Other instances of agreements made in trade competition which would fall within the condemnation of the statute are given in the cases following:

Steamship Co. vs. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 598; 1892 App. Cas., 35.

West Va. T. Co. vs. Standard Oil Co., 54 Cent. L. J., 246, and note; same case, 40 S. E. Rep., 591.

The foregoing case contains a very thorough discussion of the authorities:

Vegelahn vs. Guntner, 167 Mass., 92, and cases.
Guethler vs. Altman, 60 N. E. R., 355 (Ind.).

It is sufficient for the purposes of this case to confine our attention to the facts stated in the special pleas of the accused, the truth of which are admitted by the demurrers. They are, in substance, as follows:

A newspaper, The Milwaukee Journal, raised its advertising rate about 25 per cent. above its then existing rates. Three other newspapers, competitors with The Milwaukee Journal, refused to raise their advertising rates, and met their competitor's raise of rates by agreeing together that all advertisers who paid or agreed to pay The Milwaukee Journal its increased rates should have their advertisements accepted by the other three newspapers, in case they desired to advertise in any of the other three newspapers, only upon condition that they advertised in all the other three papers and paid to each a corresponding advance in rates. It will be observed that this agreement concerned property impressed by no public use; that it concerned only what private persons should do or refuse to do with their own private property; that no question of public health, morals or welfare was affected thereby; that it was done in the exercise of trade competition; that its object and purpose was to keep prices down; that it is impersonal in its aim and directed only against a policy; that it was done to injure a competitor by winning away its customers only in case it persisted in its attempt to raise prices. This result would naturally follow, for if it persisted in advancing its rates, advertisers desiring to advertise in one newspaper only could select any one of the three newspaers of the accused and avoid paying the advanced rate; advertisers desiring two newspapers could select two of the three newspapers of the accused paying the old rates instead of selecting The Milwaukee Journal and one of the newspapers of the accused, and so saving the advance of 25 per cent. on the rates of both; advertisers desiring to advertise in

three newspapers could select the three newspapers of the accused instead of The Milwaukee Journal and two of the newspapers of the accused and so save the advance of 25 per cent. in the rates of each; all advertisers desiring to advertise in four newspapers could of course use all four by paying each of the three newspapers of the accused the same rates as they paid The Milwaukee Journal.

It will also be observed that as the advertising trade is necessarily a limited one, the injury sustained by The Journal Company by a loss of customers was an advantage to the newspapers of the accused in so far as they could attract and secure such advertisers. And while the intent of the accused was to injure The Journal Company in the sense of trade competiton, the intent was also to benefit their own newspapers. The pleas admitted by the demurrers negative any malice or unlawful intent by showing the exercise of a legal right by accused; for malice or criminal intent will not be presumed where the act is consistent with legality.

West Va. T. Co. vs. Standard Oil Co., supra.

In this case the accused were adjudged guilty of an offence under the Wisconsin statute mentioned and sentence of fine or imprisonment imposed notwithstanding their claim of immunity for those acts on constitutional ground.

Aikens vs. State, 89 N. W. Rep., 1135.
Huegin vs. State, ibid.
State ex rel. Durner vs. Huegin, 110 Wis., 189.

In reading the opinion of the Supreme Court of Wisconsin in the *habeas corpus* proceedings (110 Wis., 189) this distinction should be borne in mind, namely: in the *habeas corpus* proceedings, in which the sufficiency of the complaint upon which the accused were originally brought before the examining magistrate was considered, the complaint, although it set out the facts, alleged generally a malicious and unlawful intent to injure, and did not show expressly, but left it to inference from the facts set forth that the acts complained of were done in

trade competition while the pleas, the truth of which is admitted by the demurrers, allege that the acts were done in trade competition and negative any unlawful intent.

The pleas therefore raise the additional question, namely: whether or not even if this statute is valid it makes criminal, acts of co-operation in trade competition without any intent to inflict injury other than the usual loss to a rival caused by successful competition.

If the words of the statute (Section 4466a, Wis. Statutes 1898) "Injuring another by any means whatever," as interpreted by the Supreme Court of Wisconsin, include within the term "injuring" a loss to business by trade competition and covers every act, whether lawful or unlawful in itself, which may prejudice another in his business as illustrated by the facts stated in the pleas in this case, the statute and the decisions of the Supreme Court sustaining it and so applying it deprives the citizen of the "liberty" of pursuing a lawful private calling and of the right of making contracts in respect thereto not injurious to the public welfare.

Niagara F. Ins. Co. vs. Cornell, 110 Fed., 816, 824.

Allgeyer vs. Louisiana, 165 U. S., 578; 17 Sup. Ct. Rep., 427.

Frisbie vs. U. S., 157 U. S., 160, 165; 15 Sup. Ct., 586.

Insurance Co. vs Cornell, 110 Fed., 816, 824 op. and cases cited.

Neither the statute (Sec. 4466a R. S. of Wis.) nor the decision sustaining it can be held as law, if subversive of these rights of the citizen, because the fourteenth section of the Federal Constitution applies to all agencies of state power, legislative, judicial and executive.

Chicago &c. R. R. Co. vs. Chicago, 166 U. S., 226; 17 Sup. Ct. R., 581.

Scott vs. McNeal, 154 U. S., 34; 14 Sup. Ct. R., 1108.

No question of public health, safety or morals is subserved by the statute, Section 4466a, nor by the decisions of the Wiscon-

sin Supreme Court in enforcing it under the facts stated in the pleas, consequently there can be no support for either under the police power of the state.

Lawton vs. Steele, 152 U. S., 133.

State vs. Dalton, 48 L. R. A., 775; same case, 22 R. I., 77.

State vs. Loomis, 21 L. R. A., 789 and note; same case, 115 Mo., 307.

It cannot be said that a statute has relation to the police power of the state when it is apparent from the statute that it has not, or when the statute, as interpreted by the State Court, goes away beyond the police power.

State vs. Santee, 53 L. R. A., 763, and cases in note; same case, 111 Iowa, 1.

Brannon's Fourteenth Amendment, pp. 480-491.

If association or combination for the purpose of trade competition were something not vital in trade and commerce, if the suppression of competitive combination did not strike at the life of economic association, and if a certain form of combination for competitive purposes were something which might be used as a cover for unlawful practices, the state might, under its police power, prohibit such form of combination. The prohibition in such case could be sustained under the rule of *Booth vs. The People,* 22 Sup. Ct. Rep., 425. But the state could not under the police power prohibit all association or joint action causing loss to another in business any more than it could prohibit all contracts in order to reach the evil mentioned in *Booth vs. The People, supra.* We submit the statute of Wisconsin hereinbefore quoted with the meaning given to it by the Supreme Court of Wisconsin in the decisions here for review, does prohibit all association for competitive purposes and consequently is the very kind of law which *Booth vs. The People, supra,* distinguishes as invalid and as infringement of rights secured by fundamental law. The statute as construed by the Court below prohibits all association for competitive purposes

because all such association is wilful and all such association is for the purpose of injuring another in his trade within this loose meaning of the word "injuring," and all such association is malicious if malice may be inferred from the act of offering inducements to win away customers or from the exercise of acts of competition either singly or by groups.

"Only through the principle of competition has political "economy any pretentions to the character of a science. A dic- "tum that has compressed into a sentence the economic systems "of Ricardo, James Mill, Senior, and McCulloch."

Modern Distributive Process, Clark & Giddings, 1888, p. 18.

In a book by Prof. C. H. Cooley of Ann Arbor, published also in the Proceedings of American Economic Association of 1899, pp. 78, 173, the author at page 109 states this evident truth:

"There is no clear dividing line between individual and "group competition. In a certain sense it may be said that "there is no individual competition since the competing per- "son always draws aid and comfort of one sort or another from "other persons. So far as man is social and not merely ani- "mal he is the center and in a manner the product of a complex "web of relations and influence from which he can in no way "be separated unless by death. By group, however, is ordinar- "ily intended in this connection a definite association with "distinct purposes and organization. One of the chief pur- "poses of the creation of such definite groups is to compete "more effectually."

And again, *ibid.*, p. 107:

"True freedom, healthy organization and the highest type "of competition inevitably go together. They are indeed va- "rious aspects of the same thing. Freedom is possible only "through open competition and through an organization that "promotes the highest development of each individual; the best "organization is not only the outcome of rational freedom and "just competition, but is also a means of securing these."

It requires no special learning as an economist to appreciate the truth that association, combination and joint action are necessary parts of the competitive system. Take the case at bar. The complainants themselves are associated together to acquire trade, win away customers and injure other competitors in their trade in all modes not involving the violation of property rights. They do this intentionally and for the purpose of injuring other competitors within this loose or popular meaning of the word "injuring." It is only by their joint action and endeavor that they are able to offer their advertising advantages to the public and to raise the rates. The information shows by fair inference, that the prosecutor, the Journal Company, is as guilty under this statute so construed as the accused. For did not its managers combine, associate and agree to raise its prices to the injury in their trade of those who might have to pay such increased prices? This demonstrates the absurdity of such a law. Under such a law the counsel for the accused are liable, for did they not combine, associate, etc., for the purpose of injuring another by some means whatever? This Court in consultation must associate, agree together and combine for the purpose of deciding this cause and thereby "injuring" someone in the sense of causing loss.

To re-state the foregoing argumentatively: all such association is necessarily wilful in the sense of intentional. All such association injures the other competitor in his trade by causing a loss or diminution therein. If the intention to win away trade and patronage from another is a "malicious" intention, all competition is "malicious." If such intention, being a mere intention to exercise a legal right, is not "malicious," then the plea in this case is good. But the decision below and the construction thereby given the statute in question is to the effect that the fact that the acts charged were done in the exercise of trade competition is no justification. This is the result of the latest decision to which the writ of error herein runs. In the first decision of the habeas corpus (110 Wis., 189) the State Supreme Court undertook to decide the motives of the parties in this competition and stated that the means adopted as

shown in the complaint (information) indicated that the motives of the accused were malicious because the accused could not be benefited by the means employed. This is a very patent error arising, perhaps, from lack of experience in trade competition. The winning away of customers by offering advantages is always a benefit to the trader who secures their patronage, provided the advantages offered are such that they still leave the trader a profit or a gain of some kind. But, as we said before, this distinction disappears from the decision of the State Supreme Court here for review because it is there held that the plea is insufficient conceding it to be true.

We contend that the decision in 110 Wis., *supra,* is also fundamentally wrong both in the conclusion that the accused could not be benefited by their association and in the proposition that a law could be valid which made group competition criminal if the mental state of the competitors exercising such right might be found by a Court or jury to be "malicious." "Any means whatever" includes lawful means and to hold that competition can only be exercised when not "malicious" is to prohibit competition.

We concede that this Court will not declare the statute in question with the construction given it by the Wisconsin Supreme Court contrary to the federal constitution unless this Court can say that the statute with such construction has no real or substantial relation to the public health, safety or morals, but is a clear, unmistakable infringement of the rights secured by fundamental law. Our contention is, however, that this statute and the decision of the Supreme Court of Wisconsin in the case at bar cannot be upheld under the broadest scope that can be given to the police power unless this Court is prepared to go to the extent of holding that all combination or co-operation of individuals, whether for competitive purposes or not, which is intended to affect any other established business by causing a loss of trade may be punished as a misdemeanor by the State legislature. This, however, asserts the power of the state to suppress co-operative competition and

combinations for trade purposes, such as partnership, and it also assumes that a power exists in the state to declare that offering advantages to win away trade or custom from another in the way of competition, when this is done by the co-operation of two or more, constitutes an "injury" or the infraction of a legal right of that other. What is this but declaring that all who have patronage shall retain it and no two or more shall associate for the purpose of winning it away? Such a law creates and perpetuates monopoly. It is destructive of competition because it forbids co-operative or group competition. It makes all trade and commerce criminal because it penalizes those acts which are indispensable to carrying on trade and commerce. As applied to trade combinations it practically deprives the citizen of the liberty of pursuing a lawful calling and making contracts in respect thereto. If it be asserted that association, combination and joint action may be employed for unlawful purposes detrimental to public weal and that therefore the legislature may suppress all such, we submit that this position is unsound. Writing may be used for forgery, printing for libel, engraving for counterfeiting, chemistry to aid in felonious poisoning, meetings of the people for treasonable plots, contracts as a cover for gambling, etc., etc., but it could not be claimed that the legislature might prohibit all writing, all printing, all engraving, all meetings of the people or all contracts. Competition may be carried on to the extent of ruining a rival by driving him out of trade and after this the survivors might raise the prices, but this would not justify the suppression of competition. Besides, in the case at bar the group competition is directed solely against a policy of the complainant and not against the complainant personally, it reaches only the raise of prices and ends when the raise of prices by the complainant ends. It takes advantage of that raise of prices by offering to the public inducements to trade with the accused instead of with the complainant at its higher prices. The limits of the police power must be determined in each case as the question arises as was said by this Court in *Allgeyer vs. Louisiana, supra.* We submit that the case at bar presents upon the

plea offered by the accused the question whether or not it is within the police power of a state to penalize all association for competitive purposes if the object of such association is to injure another in his trade by attracting and drawing off his customers.

When this case was before the Supreme Court of Wisconsin upon habeas corpus it presented a different question which may be stated as follows: Can the state in the exercise of its police power prohibit such association for competitive purposes whereby it is intended to injure another in his trade in all cases where it may be found that such competition is, as a matter of fact, malicious? To this, that Court returned an affirmative answer.

When this case was before the Supreme Court of Wisconsin the second time, the question presented by the plea was: Is it a justification that the combination was entered into and the acts charged were done by the accused in the exercise of trade competition.

To this that Court returned a negative answer.

Respectfully,

GEO. D. VAN DYKE,

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W. H. TIMLIN,

Counsel for Plaintiff in Error, A. J. Aikens.